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In The
Supreme Court of the United States
October Term, 1997

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an occupant of a vehicle "carries . . . a firearm" in violation of 18 U.S.C. § 924(c), merely because the vehicle's locked trunk contains a firearm that is completely inaccessible to anyone in the passenger compartment.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, J.A. 86-116, is reported at 106 F.3d 1056. The unreported opinions of the United States District Court for the District of Massachusetts affirming Gray-Santana's and Cleveland's convictions under 18 U.S.C. § 924(c) are reproduced at J.A. 45-57 and J.A. 58-71, respectively.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on February 18, 1997. J.A. 87. The petition for a writ of certiorari was filed on April 30, 1997. On December 12, 1997, the Court granted this petition along with the petitioners' motion to proceed *in forma pauperis*, and consolidated this case with *Muscarello v. United States*, No. 96-1654. J.A. 117. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years[.]" The language of § 924 and other provisions of Title 18, chapter 44 discussed herein are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

In *Bailey v. United States*, 116 S. Ct. 501 (1995), the Court held that "use . . . of a firearm," for the purposes of 18 U.S.C. § 924(c), requires a showing of active employment of a weapon during and in relation to a predicate offense. The Court rejected a broader definition of use, requiring only "proximity and accessibility," that would have brought within its sweep possession, *Bailey*, 116 S. Ct. at 506, and placement of a weapon for future intended use, *id.* at 507. The instant case calls upon the Court to resolve the companion question, expressly reserved in *Bailey*, whether a person who has a firearm in the trunk of his car during and in relation to a predicate offense "carries a firearm" in violation of § 924(c). Petitioners contend that these circumstances do not give rise to liability under this subsection.

On October 18, 1994, Drug Enforcement Administration (DEA) agents, investigating suspected drug trafficking activity, conducted surveillance on an apartment in a complex in Rocky Hill, Connecticut. J.A. 9, 21. During the course of the surveillance, two cars, a Lexus and an Isuzu Trooper, left the complex, and drove north towards Boston. J.A. 10, 23.

Upon arriving in Boston, the two vehicles drove to St. Stephen's Street near Symphony Hall. J.A. 10, 23. At some point thereafter, agents noted the arrival of petitioners in a Mazda nearby. J.A. 10, 23. Donald Cleveland, who was driving the Mazda, and Enrique Gray-Santana, a passenger in the Mazda, met with an occupant of the Lexus. J.A. 11, 23. Not long thereafter, the Lexus and the Mazda drove around the block and parked near the Trooper. An occupant of the Lexus had gotten into the back seat of the Mazda. J.A. 11, 24. Gray-Santana got out of the Mazda,

walked up St. Stephen's Street to the empty Trooper and tried, unsuccessfully, to open the door. J.A. 11, 24. Gray-Santana walked back to the Mazda, spoke with its occupants and then returned to the Trooper. J.A. 11, 24. By this time, the driver was back with the Trooper and he and Gray-Santana got in. J.A. 11, 24.

Agents stopped the Trooper and the Mazda as they were beginning to drive down St. Stephen's Street. J.A. 11, 24. At the time of the stop, Gray-Santana was a passenger in the Trooper and Cleveland was driving the Mazda. J.A. 11, 24.

Agents searched the Trooper. J.A. 11, 24. During the search, agents found a "hidden compartment" containing six kilograms of cocaine. J.A. 11, 24. Agents then searched the Mazda. J.A. 12, 25. In the trunk of the Mazda, agents found a Louis Vuitton bag. J.A. 12, 25. Three firearms were found inside the bag. J.A. 12, 25. After the search of the Mazda, Cleveland, Gray-Santana and two other men were arrested and transported back to the DEA headquarters, where both Cleveland and Gray-Santana gave statements. J.A. 12, 25.

Cleveland and Gray-Santana admitted that they had arranged a drug deal and discussed stealing, as opposed to buying, the drugs. J.A. 13, 26. On the day they were arrested, Cleveland and Gray-Santana had placed the bag containing the firearms in the trunk of the Mazda. J.A. 13. The two had packed the guns in the bag under a jacket and some sweaters. (Hearing on Motions to Suppress, May 1, 1995, at 16.) The bag, which had a zipper and a lock on it, had been closed and zipped. *Id.* at 17. The bag was placed in the trunk of the Mazda that could only be opened with the car's one key; a key that was also used

for the car's ignition. *Id.* at 18. Later that afternoon, Gray-Santana received a message on his pager from the driver of the Trooper. Gray-Santana spoke to him and they arranged to meet near Symphony Hall. J.A. 13, 26. Cleveland and Gray-Santana then went to the Symphony Hall area and, as outlined above, were arrested. J.A. 13, 26.

On March 15, 1995, a federal grand jury returned an indictment against Cleveland and Gray-Santana, J.A. 2-6, and, in July 1995, both defendants entered conditional guilty pleas to (1) attempting to possess cocaine with intent to distribute, and (2) using and carrying a firearm during and in relation to a drug trafficking crime, reserving the right to appeal adverse rulings by the trial court on their motions to suppress and motions *in limine*.¹

Following the Court's decision in *Bailey*, Cleveland and Gray-Santana both challenged the imposition of penalties pursuant to 18 U.S.C. § 924(c).² The government urged that petitioners carried the firearms by simply having them present in the trunk of the Mazda and argued that the inaccessibility of those firearms had no bearing on the matter. (Gov't Opp. to Gray-Santana's Motion for Correction of Sentence, at 8-10.) Although all parties agreed that a conviction could not be based on "use," as defined in *Bailey*, the trial court judge sustained

¹ Although Cleveland and Gray-Santana appealed the trial judge's adverse rulings on these motions to the First Circuit, these claims are not before the Court.

² Gray-Santana, who attended his sentencing hearing, but against whom judgment had not yet entered at the time of the *Bailey* decision, sought relief *via* a Motion to Correct Sentence and/or for Other Appropriate Relief pursuant to Fed. R. Crim. P. 35. Cleveland sought relief after his sentence was imposed pursuant to 28 U.S.C. § 2255, and as part of his direct appeal.

the convictions based on the "carry" prong of the statute. J.A. 56, 71. Petitioners each received a ten year minimum mandatory sentence for the drug offense and a consecutive, five year minimum mandatory sentence for violation of § 924(c). J.A. 31, 74.

The First Circuit affirmed the District Court. In so doing, it aligned itself with "the Fourth, Seventh and Tenth Circuits [that] have held that a gun does not need to be readily accessible to be 'carried' in a vehicle." J.A. 110. The First Circuit acknowledged, however, "that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." J.A. 111. In reaching its holding, the First Circuit formulated and addressed the following two questions it considered unresolved by the Court's holding in *Bailey*: "First, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried'?" J.A. 105.

In answer to the first of its questions, the First Circuit held that a weapon need not be carried on a suspect's person but can simply be transported in a vehicle, relying on its earlier holding in *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996) that a weapon found in a "conveyance" (in that case a boat) was "carried" and that this holding resolved the issue for all vehicles. J.A. 105.

As to its second question, the First Circuit held that "a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." J.A. 106-107. In so doing, the First Circuit acknowledged and

then rejected *Black's Law Dictionary's* specific definition of "carry[ing] arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of a conflict with another person." J.A. 108-109 (citing *Black's Law Dictionary* 214 (6th ed. 1990)). The First Circuit recognized that this definition of "'carry arms or weapons' limits 'carrying' to the defendant's person and so at least implies accessibility." J.A. 109.

Nonetheless, the First Circuit opted for a definition of "carry" that "includes transport by vehicle" without any requirement of accessibility. J.A. 113. Judge Campbell explained:

We strongly doubt – given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle – that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's Law Dictionary* restricted definition of the phrase "carry arms or weapons" seems inapposite here.

J.A. 109-110. Instead of looking to specific definitions of "carry arms or weapons," the First Circuit reviewed definitions of the term "carry" in isolation. J.A. 108. In arriving at its conclusion, the First Circuit ignored the existence of 18 U.S.C. § 924(b), a provision immediately preceding § 924(c) in the statutory scheme, that directly prohibits the transportation of firearms by using the word "transport," not the word "carry."

SUMMARY OF ARGUMENT

Section 924(c) imposes mandatory, consecutive sentences (of at least five years and up to life imprisonment) on any person who "carries a firearm" "during and in relation to" a crime of violence or drug trafficking offense. In this case, and in *United States v. Muscarello*, No. 96-1654, the Court is called on to decide what category of conduct Congress singled out for this especially severe sanction and, conversely, what conduct with respect to firearms Congress intended to treat via other statutory sections or sentencing enhancements.

I. "Carries a firearm" under § 924(c) means bearing a firearm on the person. While in other contexts the term "carry" can mean, simply, "transport" – the definition the First Circuit gave to "carry" – when used in the context of "carrying firearms," "carry" must be understood to mean "bear on the person," a definition not requiring movement. Understanding "carrying" to be limited to "bearing on the person" is consistent with the ordinary meaning of the word "carry" when it is used in the context of firearms and is rooted in the text, structure, and legislative history of § 924(c). The Court should reject the First Circuit's "transport" test because it ignores – and renders meaningless – explicit use elsewhere in the statute of the terms "transport" and "ship" to regulate the transport of firearms and the terms "possess" and "store" to regulate mere possession. Further, reading "carries a firearm" to mean "bears on the person" is consistent with the holding and analysis set forth in *Bailey*. Finally, the petitioners' reading is dictated by the rule of lenity, because no other plausible interpretation is "unambiguously correct."

II. Petitioners prevail under an application of the "bears on the person" test. Even if the Court were to decide that "carries a firearm" has a broader meaning for the purposes of § 924(c), holding either that it includes firearms "within easy reach," or that it includes firearms in a car that are both "transported and immediately accessible," petitioners' convictions should still be vacated. The Court should take this occasion to articulate a clear limit on the scope of "carries" for the purposes of § 924(c) by distinguishing this term from "transports" and "possesses" and by defining this term in accordance with its ordinary and natural meaning.

ARGUMENT

I. ELEMENTARY PRINCIPLES OF STATUTORY INTERPRETATION COMPEL THE CONCLUSION THAT § 924(c) REQUIRES PROOF OF CARRYING A FIREARM ON THE PERSON AND THUS IS NOT SATISFIED BY EVIDENCE OF SIMPLE TRANSPORTATION OF A FIREARM.

In the case at bar, the statute provides in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall . . . be sentenced to imprisonment for five years. . . ." 18 U.S.C. § 924(c) (emphasis added). Statutory interpretation – guided by the principle that the aim is to effectuate the intent of Congress and not to second-guess it – must start with the language of the statute. *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). "The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The problem that

has split the circuits as they have attempted to apply the Court's analysis in *Bailey* to the "carry" prong of § 924(c) is that the word "carry", in isolation, has two possible meanings, to bear and to transport. However, the tools of statutory interpretation – examining the word both in the phrase "carries a firearm," and in the broader context of the entire statute, as well as reviewing the legislative history – manifest Congress' intent: one "carries a firearm" within the meaning of § 924(c) only if it is borne on the person.

A. The Plain Meaning Of The Phrase "Carries A Firearm" Is To Bear On The Person.

Since the word "carries" is not defined in the statute, it must be given its "ordinary and natural meaning," *Bailey*, 116 S. Ct. at 506, "in light of the terms that surround it[.]" *Smith v. United States*, 508 U.S. 223, 229 (1993). "[T]he meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Although "carry," unmodified, is susceptible to multiple interpretations, in the more specific context provided by the language of § 924(c) "carries a firearm" subjects an individual to criminal liability only in circumstances where a weapon is on his or her person.³

³ Phrases that come to mind that elucidate our use of language in this connection include "Speak softly and carry a big stick," "Give me your money; I'm carrying a gun." As Judge Kozinski recently noted: "If I were to say 'Don Corleone is carrying a gun' – or even just 'Don Corleone is carrying' – you would understand that the Don has a sidearm somewhere on his person. A synonym for carry in this sense is to 'pack heat.'" *United States v. Foster*, 1998 WL 2521, *1 (9th Cir. Jan. 5, 1998) (en

Review of dictionaries reveals that "carry," in the context of the phrase "carry a weapon," means exclusively "to bear on one's person." *Black's Law Dictionary* defines "carry arms or weapons" as:

To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of conflict with another person.

Black's Law Dictionary, at 214 (6th ed. 1990). Other dictionaries confirm that "carrying a firearm" means bearing a firearm on one's person. *Webster's II New College Dictionary* notes one of the meanings of "carry" as follows: "[t]o have or keep on one's person <carry a gun>[.]" *Id.* at 170 (1995). Still other dictionaries define "carry," at least in part, based on the object with which it is connected. For example, *Webster's Third New International Dictionary of the English Language Unabridged* provides that carry means "to hold, wear or have upon one's person <he carries a watch>[.]" *id.* at 343 (1971, 1976, 1986), and *American Heritage Dictionary of the English Language* notes that carry means "To keep or have on one's person: stopped carrying credit cards[.]" *id.* at 294 (3d ed. 1992). The presence of the specific and precise definition of "carrying arms or weapons" (as well as carrying other relatively small, personal items) establishes that, in context, the term

banc). In each case, one infers that the weapon is at hand and constitutes an immediate threat, or, as Judge Kozinski explained, "Criminals who pack heat are obviously much more dangerous than those who do not." *Id.* So, Don Corleone might ask his chauffeur as they drive to a warehouse, "Are you carrying?" and receive the response, "No, it's in the trunk. I'll get it later."

"carry" has a much more specific definition than the First Circuit chose to employ.⁴

The plain meaning of "carries a firearm" – bears on the person – is the meaning the Court has used in discussing § 924(c) in earlier cases. In *Smith v. United States*, the Court stated that a defendant would "'carry' a firearm by keeping it on his person whether he intends to exchange it for cocaine or fire it in self-defense." 508 U.S. 223, 236 (1993) (emphasis added).⁵ The Court in *Bailey* suggested some parameters of the term "carry" in identifying ways in which "using" and "carrying" differ, as they must to ensure that each statutory term has a "particular, nonsuperfluous meaning." *Bailey*, 116 S. Ct. at 507. The Court noted:

⁴ The Ninth Circuit, in opting for a specific definition of "carries a firearm" in § 924(c), grounds its analyses in evaluations of the "plain language." See, e.g., *Foster*, 1998 WL 2521, at *2 (reviewing the *Black's Law Dictionary* definition of "carry arms or weapons"); *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996) (observing that the *Webster's* and *Black's* definitions "suggest that the term 'carry' involves activity beyond mere possession").

⁵ The dissent in *Smith* is consistent with the majority in its characterization of "carry[ing] a firearm" as meaning "carrying it in such a manner as to be ready for use as a weapon," 508 U.S. at 246 (Scalia, J. dissenting). The dissent focused on its disagreement that *bartering* a firearm is "use." The dissent emphasized the necessity for the weapon to be immediately at hand to be carried: "[t]he ready ability to use a gun that is at hand as a weapon is perhaps one of the reasons the statute sanctions not only *using* a firearm, but *carrying* one." 508 U.S. at 247 n.4. A firearm carried, in the ordinary and natural sense of borne on the person, is readily at hand. A firearm transported in the trunk of a car, or the hold of an airplane, is not.

[A] firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction, or barter with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Id. (emphasis added). From this discussion, one learns that carrying can be found where a firearm is handled, or when a weapon is located on a person's body or in his or her clothing. This discussion also elucidates some of what carrying is not: carrying is not having a gun on display, or bartering with a firearm without handling it.⁶ Defining "carries a firearm" to mean "bears on the person" fits precisely within these parameters.

This definition of "carries a firearm" is in harmony with the Court's construction of the term "use" in *Bailey*. *Bailey* emphasized that "the inert presence of a firearm, without more, is not enough to trigger § 924(c)." *Id.* at

⁶ In *Busic v. United States*, 446 U.S. 398 (1980), the Court addressed the application of § 924(c) to a drug transaction that bears remarkable similarity to the case at bar. In that case, the two defendants arranged a drug deal, ignorant that the seller was an undercover DEA agent. They planned to steal rather than purchase the drugs. During the deal, one defendant fired several shots at the agent. His codefendant, *Busic*, had a gun in his belt when he was arrested but had not drawn it. Weapons were also found in the defendants' car. *Busic's* § 924(c) conviction was based on the "carrying" prong of § 924(c) and on his having "carried" the weapon in his belt. There was no suggestion that the weapons in the automobile would trigger "carrying" liability for either defendant. 446 U.S. at 410-411. While not dispositive of the issue of the possible scope of carrying, it is instructive that neither the parties nor the Court apparently considered that carrying would encompass all possession in a vehicle.

508. The Court also squarely rejected the notion that § 924(c) would reach a firearm that was stored or "conceal[ed]" . . . nearby to be at the ready for an imminent confrontation." *Id.* Although the *Bailey* holding explicitly construed only the "use" prong of the statute, it is worthy of note that each of these circumstances would be covered by "carry" if the "transportation" test were adopted. As the Ninth Circuit stated in *Foster*:

[T]here is nothing special about "use" that makes it susceptible to a narrow definition, while parallel terms of the same statute are defined broadly; it just so happens that "use" came before the Court [in *Bailey*], not "carry." Construing the two terms *in pari materia*, we see no basis for defining "carry" broadly while "use" is defined narrowly.

1998 WL 2521, at *3.⁷ Thus, the definition of "carry" proposed by the petitioners bears a logical and complementary relationship to "use" as defined in *Bailey* and renders coherent the structure of § 924(c).

⁷ Several other courts of appeal, among them those who elsewhere opt for "transport" as the meaning of "carry," have stated that carrying a firearm "on the person" is the most obvious meaning of that term. See, e.g., *Broadway v. United States*, 104 F.3d 901, 905 (7th Cir. 1997) ("if keeping a gun in your pants pocket does not constitute 'carrying' a gun, we cannot imagine what would") (some internal quotation marks omitted); *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("defendant actually possessing a firearm and conveying it on his person . . . during a drug transaction is perhaps the clearest example of a violation of the 'carry' prong of § 924(c)(1)"); *United States v. Johnson*, 108 F.3d 919, 921 (8th Cir. 1997) (holding that evidence of a gun found in the defendant's pants pocket was "clearly sufficient" to support a conviction for carrying a firearm during a drug trafficking offense).

The First Circuit and other circuits that have held that "carries a firearm" means "transports" have looked – erroneously – at the word "carry" in isolation.⁸ Although generally speaking, "carry" can assume two different meanings – (1) to bear on one's person, and (2) to transport – both of these meanings are not applied to every context in which the term "carry" is used. *Black's Law Dictionary* defines "carry" in terms of both meanings:

To bear, bear about, sustain, transport, remove, or convey. To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential. As applied to insurance, means "possess" or "hold."

Black's, at 214 (emphasis added);⁹ see also *Webster's Third New International Dictionary*, at 343 ("to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place . . . to hold, wear or have upon one's person <he carries a watch>");¹⁰ *The Oxford English Dictionary*, at 919-20 (2d ed. 1989) (*O.E.D.*)¹¹ These definitions indicate that,

⁸ The Court has criticized "the regrettable penchant for construing words in isolation." *Deal v. United States*, 508 U.S. 129, 133 (1993).

⁹ As noted *supra*, *Black's* defines "carry arms or weapons" separately from this general definition. It is worthy of note that if the plain language analysis began and ended with *Black's Law Dictionary*, the leading legal dictionary, petitioners' definition of "carrying a firearm" would "carry" the day.

¹⁰ Certainly, according to the ordinary and natural use of the phrase, one would not be said to be "carrying a watch" that was under clothes in a closed bag in the trunk of an automobile.

¹¹ The *O.E.D.* identifies two overarching categories of uses of the word "carry," and defines them as "I. To transport,

although "carry" may mean "transport" for some purposes, that term can also mean "bear on the person," and in the latter sense does not incorporate movement as an essential component of "carry[ing]." Above all, these definitions do not support an argument that "carries a firearm" means "transports a firearm."

Nor does the First Circuit's reasoning support its conclusion that "carries a firearm" means "transports a firearm." The First Circuit quoted a part of one dictionary's definition of "carry"¹² and concluded that the definition of carry "clearly includes transport of a firearm by

convey while bearing up[.]" *id.* at 919 (2d ed. 1989) and "II. To support, sustain[.]" *id.* at 920. In explaining the history of the word the *O.E.D.* states:

From the radical meaning which includes at once 'to remove or transport,' and 'to support or bear up,' arise two main divisions, in one of which (I.) 'removal' is the chief notion, and 'support' may be eliminated . . . while in the other (II.) 'support' is the prominent notion, and 'motion' (though usually retained) may entirely disappear.

Id. at 919. Under the second category of "carrying," the *O.E.D.* includes the definition, "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (e.g., any ornament, ensign, personal adjunct; also a name or other distinction.)" *Id.* at 921.

¹² The First Circuit, which relied exclusively on definitions provided in *Webster's Third*, referred only to one portion of this definition in supporting its decision below, while entirely ignoring and neglecting to mention a second portion of this definition, "[t]o hold, wear, or have upon one's person <he carries> a watch." J.A. 108.

car[.]” J.A. 108. The First Circuit bolstered this conclusion by looking to the etymology of the word “carry”:

Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships or even beasts of burden.

J.A. 108 (citing *Webster’s Third New International Dictionary*). However, the First Circuit omitted the next two sentences included in its source that explained that the definition of carry had evolved so that its meaning is no longer confined to the etymological source:

It has spread widely from its original meaning and may be substituted in most situations for the following words. BEAR in this sense may more strongly suggest maintaining or holding aloft the weight involved, more incidentally the fact of its being moved. . . .

Webster’s Third New International Dictionary, at 343. The language omitted by the First Circuit makes it clear that “carry” is not simply synonymous with “transport.”¹³

¹³ The First Circuit’s holding adopts a “transportation” test, despite the fact that § 924(c) itself makes no reference to motion or vehicles. Moreover, there is no express language in the statute limiting its application to predicate crimes committed, at least in part, through movement. One who “carries” a firearm, in the sense that it is on his person, is subject to this statute if he sits motionless in a room, or in the woods, and guards drugs he intends to distribute. To read the word “carries” as requiring transportation does not reach such scenarios. Still more strained is a reading of “carries” that is bifurcated, encompassing both having a firearm on one’s person (without any requirement of movement) and transporting a firearm in a vehicle but not on one’s person (where movement is necessary). These two meanings are to be found, listed separately, in the dictionaries, but no single listing encompasses

The First Circuit erroneously chose to focus on the word “carries” in isolation, and not as part of the phrase “carries a weapon.”¹⁴ The First Circuit dismissed *Black’s Law Dictionary’s* definition of “carry[ing] arms or weapons” as “inapposite,” reasoning “We strongly doubt

within a single meaning of “carry,” bearing on the person if not in a vehicle, and transporting if in a vehicle. There is no explanation for the creation of such a hybrid nonce-meaning other than the desire to reach a particular result.

Others who contend that the statute’s “plain language” requires a broad definition of “carry” that encompasses all “transportation” argue that “just as there are different ways to use a firearm, there are also different ways to carry it. One way is in your hand, another is to carry it in the trunk of your car.” *Foster*, 1998 WL 2521, at *9 (Trott, J. dissenting). Judge Trott asserted that “[c]ars . . . are designed to carry people and things from place to place. Cars function as extensions of the person when it comes to transporting objects. A car is simply a means of transportation – like a holster.” *Id.* at 10. Aside from the fact that this analysis fails to address or resolve the dichotomy between “carrying a firearm” in a holster (requiring no motion) and “carrying a firearm” in a car (requiring motion), Judge Trott fails to acknowledge the obvious fact that a gun carried in a holster presents a far greater danger to others than an inaccessible gun in the trunk of a car. The two receptacles are simply not equivalent. This is made clear by considering that yet another means of “carrying” a gun – in the sense of transporting it – is to carry it on an ocean liner. If the gun is in your stateroom on level one, and you are conducting a drug transaction in the seller’s stateroom on level six, it is difficult to see how the ocean liner is like a holster. In fact, the ocean liner is more like a hotel.

¹⁴ Similarly, when the Fourth Circuit, which opted for a broad definition of carry, went to the dictionaries, it chose to ignore that § 924(c) used the term within the phrase, “carries a firearm,” and failed to acknowledge the *Black’s* definition of “carry[ing] arms or weapons.” See *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997).

... that Congress ... meant to exclude a defendant who transports the gun in his car, rather than on his person[.]” J.A. 109. This explanation for bypassing the plain and ordinary meaning of the phrase “carries a firearm” lacks persuasive force.

B. Analyzing § 924(c) In The Context Of The Entire Statutory Scheme Confirms That “Carries A Firearm” Should Be Accorded A Precise And Specific Meaning.

As the Court recognized in *Bailey*, 116 S. Ct. at 506, the definition of a word in a statute is a function of “not only [of] the bare meaning of the word but also its placement and purpose in the statutory scheme.” Each term in a statute should be read in light of the surrounding provisions of the law as a whole. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94 (1993). As the Court reiterated in *Smith v. United States*:

“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”

508 U.S. 223, 233-234 (1993) (quoting *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Just as the First Circuit erred by looking at the word “carry” in isolation, so, too, it committed error by failing to look at the statutory scheme of which § 924(c) is a part. Review of that scheme fortifies the

conclusion that Congress intended the term “carries a firearm” to refer to firearms carried on the person.

The statutory scheme reveals that Congress did not intend “carry” to mean either “transport” or “possess.” This is clear because Congress described conduct involving possession and transportation of firearms in motor vehicles and other modes of transport with terms other than “carries a firearm.” In addition, the statutory scheme reflects that Congress developed a penalty scheme to respond to its assessment of the comparative harm or danger associated with particular acts. Within this scheme, § 924(c) carries potentially the stiffest of penalties, a fact that militates against construing the terms of that section – use and carry a firearm – too broadly, in derogation of their plain meanings.

1. Congress Used The Word “Transport,” Not “Carry,” To Penalize Transportation Of Firearms.

A review of the statutory scheme set forth in § 924 and in Chapter 44 of Title 18 as a whole, lends force to the conclusion that “carry” in the § 924(c) context “uses or carries a firearm” cannot be read as broadly as the First Circuit read it and as the government would have it read by the Court. Congress, by its careful choice of language in defining what conduct to penalize, and the degree to which different forms of conduct would be punished, precluded a broad definition of the term “carry” that would be synonymous with either “transportation” or “possession,” words that Congress chose to utilize in other related statutory sections, but not in § 924(c).

In § 924, “carry” does not mean “transport” and “carries a firearm” does not mean “transports a firearm.”

The statutory sections surrounding § 924(c) indicate that if Congress had intended to proscribe the transport of weapons in vehicles, or in some subset of vehicles, during or in relation to drug crimes or crimes of violence, it had at hand the precise vocabulary to do so. For example, Congress used "transport," "ship," "transfer," and "deliver" frequently in §§ 922 and 924 to proscribe the movement of firearms in interstate commerce. "Transport," "transporting" and "transportation" alone are used in numerous subsections of the gun control statutes.¹⁵ Section 924(b), for example, proscribes, *inter alia*, transporting a firearm in interstate commerce with intent that a felony be committed therewith. Congress clearly knew how to criminalize the movement of weapons, and in § 924(b) did so by using the verb "transport." Had Congress intended to prohibit transportation of weapons, during and in relation to a violent crime or drug offense, it would not have used the distinct term "carries" in § 924(c) to describe the conduct it had described with the word "transport" in § 924(b) and elsewhere.¹⁶ See *Bailey*, 116 S. Ct. at 506. ("[W]e read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning.")

This point was articulated by the ultimately successful dissenters to the D.C. Circuit's *en banc* opinion in

¹⁵ See, e.g., §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(g), 922(h), 922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4), 925(c), and 926A.

¹⁶ As the Ninth Circuit noted, "If Congress wants us to put people like [the defendant] in prison for a longer time, it can rewrite the law to give us clearer instructions, perhaps by using the word 'transport' in § 924(c)(1) as it does in various other sections of the firearm statutes." *Foster*, 1998 WL 2521, at *5.

Bailey, Judges Williams, Silberman and Buckley, who concluded that "carry" did not mean "transport" and that immediate accessibility was required for "carrying," based in part on the statutory scheme:

[We] do not believe § 924(c) can properly be extended . . . [to a] defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Rather, consonant with an active notion of "use," with the Senate Report's example of a weapon carried in the defendant's pocket, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

36 F.3d 106, 125 (D.C. Cir. 1994) (emphasis added) (citations omitted), *rev'd*, 116 S. Ct. 501 (1995).

In addition to the prohibitions against transporting firearms, Congress elsewhere prohibited "shipping," "smuggling," "delivering," "bringing" and "importing,"

of firearms under various circumstances.¹⁷ Congress did not include any of these terms, all indicative of movement or locomotion, as part of § 924(c), and could not have meant "carries" to duplicate any of these terms used elsewhere in the same statute.

2. Congress Used The Word "Possess," Not "Carry," To Penalize Possession Of Firearms.

"Carry" does not mean "possess." The Court in *Bailey* ruled that "mere possession by a person who commits a drug offense" does not constitute "use" within the meaning of § 924(c). 116 S. Ct. at 508. The Court explained, "If Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term – 'possession' – to cover the conduct it wished to reach." *Id.* The same analysis applies to the term "carries."¹⁸ If Congress had intended to proscribe custody or control of a firearm, it would have done so unambiguously by substituting – or adding – the term "possesses" to § 924(c). In numerous sections of the gun

¹⁷ See, e.g., §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(5), 922(a)(8), 922(b), 922(e), 922(f)(1), 922(f)(2), 922(g), 922(i), 922(j), 922(k), 922(l), 922(n), 922(p)(1), 922(p)(6), 922(s)(1), 922(x), 924(a)(1)(C), 924(b), 924(d)(1), 924(k), 925(a)(1), 925(a)(2), 925(a)(3), 925(a)(4), 925(c), 925(d) and 926A.

¹⁸ Similarly, Justice Breyer, in his dissent from the First Circuit's decision in *United States v. McFadden*, stated that "the ordinary meanings of the words 'use' and 'carry' . . . connote activity beyond simple possession." 13 F.3d 463, 467 (1st Cir. 1994).

statutes, Congress used the term "possess" without any reference to "carrying."¹⁹

Portions of the statutory scheme that refer to both "possession" and "carrying" elucidate that the proper scope of each term is restricted to its respective ordinary and natural meaning. For example, in § 929, Congress addressed "using," "carrying," and "possessing." That section provides:

Whoever, during and in relation to the commission of a crime of violence or drug trafficking crime . . . uses or carries a firearm and is in possession of armor piercing ammunition capable of being fired in that firearm, shall . . . be sentenced to a term of imprisonment for not less than five years.

Section 929(a)(1) (emphasis added). This section demonstrates the fact that Congress intended carry to have a meaning distinct from possess, and had it intended to reach all possession under § 924(c), it would have done so.²⁰

¹⁹ See, e.g., §§ 922(g), 922(h)(1), 922(j), 922(k), 922(p)(1), 922(p)(6), 922(q)(2)(A), 922(q)(2)(B), 922(v)(1), 922(w)(1), 924(a)(6)(A)(ii)(I), 925(a)(1), 925(c), 930(a), 930(b), 930(e), and 930(f).

²⁰ Similarly, in § 924(a)(6)(B)(ii), punishment is prescribed for one who knowingly provides a handgun or handgun ammunition to a juvenile, "knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence. . . ." (Emphasis added). Congress, in this subsection, used "carry" as a sub-set of possession, not as a co-extensive term.

3. Congress Used The Words "Transport" And "Possess," Not "Carry," To Regulate Transportation And Possession Of Firearms In Vehicles.

The statutory scheme also indicates that Congress explicitly regulated, in those circumstances where it wanted to, the combination of firearms and motor vehicles, contradicting the First Circuit's notion that the ubiquity of cars compels equating "carries a firearm" with "transporting a firearm" when cars are involved. J.A. 109. For example, Congress elsewhere specified a class of vehicles in prohibiting the "transport" or "shipment" of firearms on common carriers.²¹ Congress thus expressly regulated "transporting firearms in a vehicle," but did not use the term "carry" to do so.

In § 926A, Congress used a panoply of terms relevant to the instant inquiry, revealing both that Congress intended to distinguish among transporting, possessing, and carrying, and that it knew how to specifically address automobiles:

[A]ny person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to *transport* a firearm for any lawful purpose from any place where he may lawfully *possess* and *carry* such firearm to any other place where he may lawfully *possess* and *carry* such firearm if, during such *transportation* the firearm is unloaded, and neither the firearm nor any ammunition being *transported* is readily accessible or is directly accessible from the passenger compartment of such *transporting* vehicle: *Provided*, That in the

²¹ See, e.g., §§ 922(e) and (f) (dealing with transport or shipment of weapons on common or contract carriers).

case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (some emphasis added). Here, Congress directly addressed transporting firearms in a motor vehicle. Congress did not refer to carrying a firearm in a vehicle in § 926A; it referred to "transport[ing] a firearm," using the ordinary and natural sense of the word transport to describe movement of a firearm from one place to another. Surely, where Congress can with such minute detail specify what is licit transportation of a firearm in a vehicle, it would have done the same for illicit transportation had it intended § 924(c) to proscribe transportation of firearms in vehicles.

Congress repeatedly distinguished in Chapter 44 among the transportation, possession and carrying of weapons. That it did so refutes the First Circuit's reasoning in holding that "carry" means "transport" in § 924(c). Even outside Chapter 44, Congress addressed explosives and dangerous weapons aboard vessels as follows: "Whoever brings, carries, or possesses any dangerous weapon . . . on board of any [designated] vessel . . . [without permission] . . . shall be [punished]." 18 U.S.C. § 2277(a). Similarly, in addressing explosives on certain passenger vessels, Congress punished "[w]hoever . . . takes, carries or has on board of any such vessel [certain explosives.]" 18 U.S.C. § 2278. If "carries" means merely possesses or transports, the phrase "has on board" is reduced to surplusage. These statutes demonstrate that Congress considered "carrying" distinct from "bringing," "possessing," "taking" or "having" a weapon on board a vessel; similarly, in § 924(c), "carrying" is distinct from

"bringing," "possessing," "taking," "transporting," or "having" in a vehicle.

Unlike the statutes discussed above, there is no mention of automobiles or other vehicles in § 924(c), and no mention of activities other than using or carrying. Had Congress wanted to proscribe transporting weapons in vehicles in § 924(c), it would have employed the specific terms it used elsewhere in the statute; that it did not serves as an indication of the intended limits on the scope of the term "carry."²²

4. The Gradations Of Punishment Set Forth In The Statutory Scheme Reinforce The Conclusion That "Carry" Was Not Intended To Be Given An Overly Broad Definition.

Consideration of the gradations of punishment set out by Congress in the statutory scheme of § 924 for various transgressions further supports the ordinary meaning of "carries a firearm" that petitioners advocate. Section 924 prescribes penalties for a myriad of firearm offenses and offenses in which firearms play some role, as well as for forfeiture of firearms involved in such offenses. Congress set out in § 924 a painstakingly

²² The dissent in *Foster* glosses over this obvious omission, writing: "This is not a 'puzzle,' and we do not need 'clues' to solve it. It's 'carry,' that's all, and it's carry in a vehicle during and in relation to a drug trafficking crime." 1998 WL 2521, at *6 (dissenting opinion). This "analysis" ignores that the statute does not read "carry in a vehicle;" it reads "carr[y] a firearm." § 924(c)(1). It also fails to consider that the legislature *could have* included "carry in a vehicle" during and in relation to a drug trafficking crime, but did not. The ease with which Congress accomplished this end elsewhere in the statute strongly suggests that this was not the meaning it intended in § 924(c).

detailed program of criminal responsibility, providing for penalties that range from one year²³ to death. Only two subsections provide for mandatory minimum sentences – §§ 924(c) and 924(e)(1)²⁴ – and only two subsections provide that sentences imposed thereunder be made consecutive to any other sentences imposed – §§ 924(a)(4)²⁵ and 924(c). Section 924(c), alone of all the penal provisions in this statute, calls both for a mandatory minimum sentence (which may be five, ten, twenty or thirty years, or life, depending on the type of weapon involved and

²³ One year penalties are prescribed for violations by licensees of record-keeping provisions, § 924(a)(3), and of criminal record-check violations, § 924(a)(5), and for the sale, delivery or other transfer by any person of a handgun or ammunition to a juvenile, § 924(a)(6)(A), or possession thereof by a juvenile, § 924(a)(6)(B)(i). Interestingly, a licensee making a false statement under § 924(a)(3) is subject to a one year penalty, any other person making such a false statement under § 924(a)(3) is subject to a five year penalty, and anyone who makes a false statement to a licensee in connection with the acquisition of a firearm likely or intended to deceive the licensee regarding a fact material to the lawfulness of the acquisition is subject to a ten year penalty under § 924(a)(2). This increasingly harsh penalization of false statements, first if one is a customer, then if the transaction is a sale or transfer, is one example of Congress devising a system of gradations of punishment to fit the gradations of danger it perceived.

²⁴ Section 924(e)(1) penalizes possession of a firearm by convicted felons, and certain others, who have three previous convictions of serious drug offenses or crimes of violence. This recidivist provision imposes a mandatory minimum fifteen year sentence, but is not necessarily consecutive to other sentences imposed.

²⁵ Section 924(a)(4) penalizes possession of a firearm in a school zone. It was declared unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995).

whether the defendant has previously been convicted under § 924(c)) and also for that sentence to be made consecutive to the sentence imposed for the predicate felony. Thus, § 924(c) calls for potentially the harshest penalties found in § 924, save § 924(j), which has § 924(c) as its predicate offense.²⁶

Congress established a nonmandatory ten year penalty for the movement, including transportation, of firearms for an *intended future* use. § 924(b) (penalizing one who "ships, transports or receives" a firearm or ammunition with intent himself to commit a felony, or with reason to know that another intends to use the firearm or ammunition are to commit a felony).²⁷ In contrast, § 924(c) focuses on a firearm's *actual present* use, or presence on the person ready for present use, and imposes mandatory penalties.

²⁶ The death penalty is authorized, in § 924(j), if the defendant causes the death of a person through the use of a firearm in the course of a violation of § 924(c).

²⁷ Like § 924(b), other provisions in the statutory scheme establish a penalty of up to ten years for activities that enable *future*, as opposed to *present*, use. For example, § 924(a)(6)(B)(ii) penalizes "selling, delivering or otherwise transferring" a handgun to a juvenile, where the defendant has reasonable basis to know the juvenile intends to possess or use the gun in a crime of violence. Section 924(g) penalizes one who "travels" across state lines to "acquire or transfer," or attempt to do so, firearms in furtherance of an intent to violate certain laws. Section 924(h) penalizes one who "transfers" a firearm to another, knowing it will be used in a crime of violence or controlled substance offense. And § 924(k) penalizes one who "smuggles or brings into" the United States a firearm, or attempts to do so, with the intent to engage in, or promote, violations of controlled substance laws or crimes of violence.

These gradations in punishment included in the statutory scheme reflect Congress' judgment about the relative risks associated with different behaviors. The differences in penalties – a mandatory minimum, consecutive sentence for violation of the "use or carry" prohibition in § 924(c), as compared to a nonmandatory, nonconcurrent sentence for a violation of provisions dealing with movement of firearms for intended future criminal use – demonstrates that § 924(c) reaches conduct Congress deemed to be particularly dangerous. That § 924(c) does not include transportation for future criminal use is made clear by Congress' inclusion of other provisions covering such conduct and carrying lesser penalties. Section 924(c) imposes its harsher penalty where a gun is actively employed ("used") in criminal activity, or where it is on the person of the perpetrator ("carried") and thus constantly with the perpetrator, available throughout the course of a drug transaction or a violent crime for use on an instant's notice.

It is also worthy of note that the actions of petitioners could have been the subject of enhanced penalties under the sentencing guidelines. Petitioners' possession of firearms potentially subjected them to a two level increase under the sentencing guidelines, pursuant to U.S.S.G. § 2D1.1(b)(1). Such an upward adjustment would have resulted in substantial increases in the defendants' sentences. See *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, J. dissenting) (noting that the two level guideline enhancement would increase the sentence by 30-40%). This guideline mechanism, also a part of Congress' penalty scheme, is the appropriate means to increase penalties for drug offenders who merely possess weapons but do not use or carry them.

C. The Origins And Legislative History Of § 924(c) Demonstrate That Congress Intended To Criminalize Only Bearing A Firearm On The Person.

Since the language and structure of § 924 demonstrate that "carrying a firearm" during and in relation to a crime of violence or drug trafficking offense reaches only carrying on the person, there is no need to examine the legislative history of the provision. However, should the Court conclude that § 924(c)'s meaning is ambiguous, it can look to what little legislative history there is,²⁸ which also demonstrates that Congress intended "carry a firearm" to mean carrying a weapon on the person.²⁹

²⁸ See *United States v. Foster*, 1998 WL 2521, at *4 n.8 (9th Cir. January 5, 1998) (en banc) ("There is mercifully little legislative history on 'carry' to burden our discussion.") See also *Simpson v. United States*, 435 U.S. 6, 13-14, 13 n.7 (1978) (describing origins of provision and noting that because the eventual language of § 924(c) was "passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports").

²⁹ Justices Scalia, Kennedy and Thomas, in their concurring opinion in *United States v. R.L.C.*, 503 U.S. 291 (1992), maintain that looking to legislative history is inconsistent with the purposes of the rule of lenity: to assure that criminal statutes provide "fair warning . . . to the world in language the common world will understand, of what the law intends to do if a certain line is passed," *id.* at 308 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)), and to assure that "society, through its representatives, has genuinely called for the punishment to be meted out," *id.* at 309.

1. The Gun Control Act Of 1968.³⁰

In 1968, responding to public outcry in the wake of political assassinations, riots, and other social unrest involving guns, Congress passed two laws in quick succession: the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; and the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 88 Stat. 1213, 1224.³¹ Congress debated and passed the latter statute in the immediate aftermath of the assassinations of Senator Robert F. Kennedy and Dr. Martin Luther King, Jr. See *Busic v. United States*, 446 U.S. 398, 404 n.9 (1980); see also 114 Cong. Rec. 21,771, 21,783, 21,800 (1968).

When first enacted, § 924(c) penalized using and carrying a gun during a federal felony:

Whoever - (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224. What legislative history there is indicates that Congress

³⁰ Originally enacted as part of the Gun Control Act of 1968, § 924(c) has been amended on numerous occasions. Nevertheless, only three of those amendments (in 1984, 1986, and 1988) bear, in any way, on the scope of liability for "us[ing] or carry[ing]" a firearm. See discussion *infra* n.33 and part I.C.2.

³¹ See H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7, reprinted in 1968 U.S.C.C.A.N. 4410, 4412-4413; S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968).

intended "carries a firearm" to have a specific and tailored definition. See *United States v. Santos*, 84 F.3d 43, 46-47 ("We have recognized that '[n]either the legislative history of § 924(c)(1) nor case law in this circuit suggest[s] that the term "carry" should be construed as having any meaning beyond its literal meaning.' Accordingly, we have construed that term narrowly"), modified, 95 F.3d 116 (2d Cir. 1996).

Drug offenses were not explicitly mentioned in the original version of § 924(c).³² Rather, the legislative history of the 1968 act indicates that the crimes of concern were murders, assaults, rapes, burglaries and robberies. See, e.g., 114 Cong. Rec. 21,800, 22,230, 22,235 (1968). The offenses addressed by Congress have no special association with automobiles and no such associations are to be found in the legislative history. This legislative history belies the First Circuit's argument below that Congress

³² It was not until 1986, as part of the *Firearm Owners' Protection Act*, that Congress expanded § 924(c)'s predicate offenses to include any "drug trafficking offense," defining those offenses as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." Pub. L. No. 99-308, § 104, 100 Stat. 449, 457. In 1988, in the *Anti-Drug Abuse Act*, Congress broadened the definition of "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360.

Petitioners have been unable to find any evidence in the slight legislative history of either the 1986 or 1988 Acts to suggest that Congress considered how the "carry" or "use" provisions would function when applied to predicate drug offenses.

must have intended to "includ[e] transport by vehicle" in the definition of the word "carry" given the ubiquity of vehicular involvement in drug offenses. J.A. 109.³³ Given that drug offenses were expressly named as predicate acts only in 1986, it is unlikely that the use of cars in drug transactions influenced Congress' understanding of the scope of "carry" when the statute was enacted originally eighteen years earlier.

Most importantly, the word "carry" is used, throughout the legislative history, to refer to circumstances in which a weapon is on the person. For example, in addressing the concern that the proposed legislation might criminalize incidental "carrying," unrelated to a predicate felony, the hypothetical applications of the act discussed reveal that "carrying" was taken to mean carrying on the person. See, e.g., 114 Cong. Rec. 21,788 ("Suppose a [person licensed to carry a pistol] pushes somebody . . . and he does not use the pistol but *carries it on his hip*.") (emphasis added); *id.* at 21,788-21,789 ("if I push somebody in the street or punch somebody in the nose -

³³ The First Circuit wrote:

We strongly doubt - given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle - that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.

J.A. 109. The legislative history of § 924(c) shows this argument to be inaccurate speculation.

with no use of the pistol, but merely *carrying* the pistol . . . ") (emphasis added); *id.* at 22,239 (indicating the desire to "make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law . . . for merely *carrying* a gun") (emphasis added).

2. The Comprehensive Crime Control Act Of 1984.

In 1984, Congress undertook a substantial reworking of § 924(c)(1).³⁴ Among other things, the amended statute combined the "use" and "carry" prongs of the original provision, eliminated the requirement that the firearm be carried "unlawfully,"³⁵ added the requirement that it be carried or used "during and in relation to" the predicate offense³⁶ and changed the predicate offense from "any

³⁴ As rewritten, § 924(c) read, in pertinent part:

Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

³⁵ Although the 1984 amendment of § 924(c) eliminated the requirement that carrying be "unlawful," this does not suggest that Congress altered its understanding of what constituted "carrying," but only that those duly licensed to carry weapons for the first time came within the prohibitions of § 924(c).

³⁶ Insofar as Congress intended to change the scope of carrying liability by adding the phrase "in relation to,"

felony" to "any crime of violence." The scant legislative history fails to elaborate on most of these changes.³⁷

Nevertheless, a Senate report sheds light on the intended contours of § 924(c) liability under the "carry" prong:

Evidence that the defendant had a *gun in his pocket* but did not display it, or refer to it, could . . . support a conviction for "*carrying*" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. Rep. No. 225, at 314 n.10 (1983) (emphasis added). This language helps elucidate congressional meaning regarding the intended scope of "carrying a firearm," *i.e.*, it is restricted to the ordinary and natural sense of bearing on the person.

Congress clearly meant to limit, not expand, the statute's reach by excluding use or carrying of a firearm not related to the predicate offense.

³⁷ The legislative history indicates that the goal of the amendment was to address "drafting problems" and "interpretations of the section in recent Supreme Court decisions" that had "greatly reduced its effectiveness as a deterrent to violent crime." S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490; *see also id.* at 313, 1984 U.S.C.C.A.N. at 3491. The "drafting problems" Congress wished to correct pertained to sentencing, not the definition of the offense. S. Rep. No. 225 at 313, 1984 U.S.C.C.A.N. at 3491. The decisions of the Court that Congress wished to undo were *Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978) (holding that a defendant's sentence could not be enhanced pursuant to both the underlying offense and § 924(c)).

D. Mere Transportation Of A Firearm For Use Does Not Constitute Carrying A Firearm Under § 924(c).

The courts of appeal that have sided with the First Circuit maintain the broadest possible concept of "carry," purporting to avoid the conclusion that "carry" is synonymous with "possess" on the one hand, or with "transport" on the other, by asserting that it means the intersection of the two: possession, constructive or actual, together with transportation. See, e.g., *United States v. Mitchell*, 104 F.3d 649, 654 (4th Cir. 1997) (defendant "knowingly possessed and transported the firearm in his automobile").³⁸ There are several fatal flaws in this "possession and transportation" rendering of "carrying."

First, as the Court stated in *Bailey*, each of the two prongs of § 924(c), use and carrying, must be defined narrowly enough that neither swallows up the other. 116 S. Ct. at 508. In the context of a moving vehicle, the First Circuit's definition of "carry" swallows entirely any meaningful role for "use," since *any* possession of the firearm under that definition constitutes "carrying."

Second, construing "carries a firearm" to mean "transport and possess" is indistinguishable from construing it as simple "transporting" in the context of § 924(c). It is hard to imagine how one could transport a weapon during and in relation to a drug offense or crime

³⁸ Accord *United States v. Holland*, 116 F.3d 1353, 1359 (10th Cir.) (upholding conviction under § 924(c) for "carrying" where gun was transported in vehicle operated by defendant), cert. denied, 118 S. Ct. 253 (1997); *United States v. Muscarello*, 106 F.3d 636 (5th Cir.), cert. granted, 118 S. Ct. 621 (1997); *United States v. Molina*, 102 F.3d 928 (7th Cir. 1996); and *Wilson v. United States*, 125 F.3d 1087 (7th Cir. 1997).

of violence without exercising dominion and control over it, which is all that is required for possession. The definition of "carry a firearm" adopted by the First Circuit thus reduces to "transport." However, Congress used "transport" elsewhere in § 924 and in Chapter 44, and consequently meant "carry" to mean something different when it chose that term in § 924(c). See discussion *supra* part I.B.1.

Third, the First Circuit definition of "carry" – transport – does not encompass a stationary defendant with a gun concealed on his person. This is the paradigm case of carrying a firearm as noted by the Court in *Bailey*, 116 S. Ct. at 507, as well as in the legislative history, see discussion *supra*, part I.C, although it involves no element of transportation. See also *Broadway v. United States*, 104 F.3d 901, 905 (7th Cir. 1997) ("if keeping a gun in your pants pocket does not constitute 'carrying' a gun, we cannot imagine what would").

Two courts of appeal that have adopted the broad definition "transportation plus possession" have addressed this problem by rendering "carrying in a motor vehicle" a special case, different from carrying on the person.³⁹ The "possession and transportation" test

³⁹ In *United States v. Rivas*, the Fifth Circuit made this dichotomy explicit: "[W]e . . . recognized that carrying on the person is different from carrying in a vehicle 'because the means of carrying is the vehicle itself.'" 85 F.3d 193, 195 (5th Cir.), cert. denied, 117 S. Ct. 593 (1996). In *Muscarello*, the companion case to petitioners' case, the Fifth Circuit observed that "what constitutes 'carrying' under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation." 106 F.3d at 639. The Seventh Circuit has implicitly distinguished

requires taking the phrase "carries a firearm" and formulating *two distinct* definitions, one for when the firearm is actually on the person of the defendant, another when it is not. This result-driven approach is without justification on any basis other than the desire to bring every form of possession in a vehicle within the ambit of § 924(c). It is a far cry from simply discerning the plain meaning of the phrase "carries a firearm."

In light of a lengthy statute setting forth a detailed and considered regulatory scheme for firearms, in which Congress has variously regulated possession, transportation, receipt, importation, and shipment of firearms, Congress' regulation of carrying a firearm in § 924(c) should be given a singular, precise meaning – not one meaning for defendants in vehicles and another, quite different one for defendants not in vehicles. As discussed *supra* part I.B.3, Congress knows how to regulate the movement of firearms, even the movement of firearms in vehicles, and how to distinguish between shipment on common carriers and other transportation in vehicles. Had Congress intended to penalize "carrying" in one sense of the word ("transporting") if the defendant was in a vehicle, and another ("bearing on the person") if the defendant

between vehicular and non-vehicular carrying, affirming as a paradigm case of carrying one in which the defendant was found lying on stairs, with "50 packets of crack cocaine in one pocket and a gun in the other," *Broadway v. United States*, 104 F.3d 901, 902 (7th Cir. 1997), even while reiterating its "simple definition of 'carry' – 'to move while supporting; transport,'" *id.* at 905. The First Circuit's appeal to the special character of automobiles in drug transactions, *see* note 34 *supra*, may be an effort to justify creating a dichotomy between carrying on the person and carrying in a vehicle, in contravention of the statutory scheme.

was not in a vehicle, Congress would have used both of these terms to clearly express its intent, as it did elsewhere in the statute. Section 924(c) would then have read, "Whoever . . . uses, carries, or transports in a vehicle a firearm shall be punished. . . ." This Congress did not do. The Court should not substitute its will for that of Congress and effectively rewrite § 924(c) to add a prohibition against the transportation of firearms.⁴⁰

E. If The Court Finds The Phrase "Carries A Firearm" At All Ambiguous, The Rule Of Lenity Requires § 924(c) Be Construed In The Petitioners' Favor.

The language, structure and legislative history of § 924(c) forcefully support the meaning assigned to "carries a firearm" propounded by petitioners. But even if the

⁴⁰ It is noteworthy that twenty-two states have enacted bifurcated carrying statutes, criminalizing the carrying of concealed or unpermitted weapons on the person, and also criminalizing transporting concealed or unpermitted weapons in a motor vehicle. *See, e.g.* Ariz. Crim. Code § 13-3102.A.1 & 2 (Supp. 1997) ("1. Carrying a deadly weapon . . . concealed on his person; or 2. Carrying a deadly weapon . . . concealed within immediate control of any person in or on a means of transportation."); Cal. Penal Code § 12025(a)(1), (2) (Deering Supp. 1997) ("A person is guilty of carrying a concealed firearm when he or she . . . (1) Carries concealed within any vehicle which is under his or her control or direction any pistol or firearm capable of being concealed upon the person. (2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person."); Mass. Gen. Laws c. 269, § 10(a) (1990 & Supp. 1997) ("Whoever, . . . knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm . . ."). These legislatures found no difficulty in spelling out that transporting a firearm in a vehicle, as well as bearing a firearm on the person, were both prohibited.

Court disagrees, "[a]t the very least, it may be said that the issue is subject to some doubt." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978). In these circumstances, "where text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity applies and requires that the ambiguity must be resolved in the defendant's favor, *United States v. Granderson*, 511 U.S. 39, 54 (1994); *Simpson v. United States*, 435 U.S. 6, 14 (1978); *Adamo Wrecking Co.*, 434 U.S. at 284-285; *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). As the Court said in *Ladner v. United States*, "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U.S. 169, 178 (1958).

This "venerable" rule of lenity is rooted in "the instinctive distaste against men languishing in prison unless a lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (quoting H. Friendly, *Benchmarks* 196, 209 (1967)).⁴¹ The Court has determined that the rule is "founded on two policies that have long been part of our tradition." *Id.* As the Court reiterated in *Bass*:

First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair,

⁴¹ This admonition must apply with particular force in this case, where a prison term is both mandatory and consecutive to the sentence imposed on the predicate drug conviction. See discussion *supra* part I.B.4.

so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment normally represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. (citations and internal quotations omitted) (emphasis added). Justice Frankfurter also explained this policy in *Bell v. United States*,

When Congress has the will it has no difficulty in expressing it – when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

349 U.S. 81, 83 (1955).

In the present case, the First Circuit did not address the rule of lenity, nor did it explain why its interpretation of the term "carry" was "unambiguously correct." Indeed, the plain meaning of the word, the structure and history of the statute, and the split, acknowledged by the First Circuit, among the courts of appeal make it abundantly clear that the First Circuit's "carrying equals transportation" interpretation is not "unambiguously

correct."⁴² Therefore, the rule of lenity requires that the phrase "carries a firearm" must be interpreted in petitioners' favor, as not applying to the presence of firearms located under clothing, in a zipped bag, in the locked trunk of a vehicle in which the petitioners had been riding.

II. SINCE PETITIONERS DID NOT CARRY A FIREARM EITHER "ON THEIR PERSONS" OR "WITHIN EASY REACH" THEIR CONDUCT DID NOT VIOLATE § 924(c).

A. Neither Petitioner Carried A Firearm On His Person.

For all the reasons outlined above *supra* part I, this Court should conclude that "carries a firearm" for the purposes of § 924(c) requires proof that a defendant carried a firearm on his or her person, during and in relation to a predicate offense. Under this standard, petitioners' conduct does not subject them to criminal liability under § 924(c). Petitioners, convicted of attempting to possess cocaine with intent to distribute it, were arrested during, but before the completion of, a drug transaction. Weapons were found in the locked trunk of their car, under some clothes in a zipped bag. The weapons were

⁴² The Tenth Circuit acknowledged the "transportation" analysis is not unambiguously correct in *United States v. Miller*, where it noted, "one could interpret this language as meaning that a conviction under the 'carry' prong of 18 U.S.C. § 924(c)(1) cannot stand absent evidence that the defendant physically carried a firearm on his person." 84 F.3d 1244, 1259 (10th Cir.), *cert. denied*, 118 S. Ct. 419 (1997), *overruled on other grounds by United States v. Holland*, 116 F.3d 1353 (10th Cir.), *cert. denied*, 118 S. Ct. 253 (1997).

not on the person of either Gray-Santana or Cleveland. In short, these weapons were not carried in the sense petitioners argue is necessary to find a violation of § 924(c).

B. Petitioners Did Not Have A Weapon "Within Reach" Nor Did They Move With Or Transport An "Immediately Accessible" Weapon.

Even if the Court were to reject the "on the person" definition of carrying firearms, petitioners still prevail under the broader "within reach" or "immediate accessibility" test adopted by the Second, Sixth and Ninth Circuits.⁴³ Although those circuits take slightly variant

⁴³ A number of other circuit courts have indicated that they, too, may adopt a requirement of "immediate accessibility" when the case is presented. In *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997), the District of Columbia Circuit concluded, albeit without discussion and with the agreement of the government, that evidence of a weapon stowed in the engine compartment of a car was insufficient to sustain a conviction for using or carrying a firearm under § 924(c). This holding suggests that the D.C. Circuit requires some degree of accessibility to make out "carrying a firearm" and may join ranks with the Second, Sixth and Ninth Circuits in requiring that a firearm be "within reach" to be carried. Without deciding the ultimate issue of whether or not a firearm must be immediately accessible to be carried, the Third, Eighth and Eleventh Circuits have only imposed liability for carrying where immediate accessibility was proved. See, e.g., *United States v. Eyer*, 113 F.3d 470, 476 (3rd Cir. 1997) (holding that the facts of that case "compel the conclusion that [the defendant] was carrying the firearm" where he had "easy access to the handgun" while that weapon was being transported); *United States v. Larkin*, 118 F.3d 1253, 1254 (8th Cir.) (reaffirming holding that "'transporting firearms in the passenger compartment of a car loaded with drugs' constitutes carrying a firearm within the meaning of § 924(c)(1)"), *cert. denied*, 118

approaches to the role movement plays in their definitions of "carrying," the presence of firearms in the trunk of the defendants' car would not support liability under any of these formulations. None of the circuits has adopted the plain meaning of "carries a firearm." However, because the definitions adopted by these circuits require close proximity to the body, they come closer to the on the person meaning of "carrying" than the First Circuit's "transportation" definition does. Any of these definitions is therefore preferable to the "transportation" definition.

The Second Circuit test for "carries a firearm" requires "'at least a showing that the gun [was] within reach during the commission of the drug offense' in order to sustain a conviction for carrying a firearm [under § 924(c)]." *United States v. Santos*, 84 F.3d 43, 47 (2d Cir.) (citation omitted), modified, 95 F.3d 116 (2d Cir. 1996). See also *United States v. Cruz-Rojas*, 101 F.3d 283, 285-86 (2d Cir. 1996); *United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir.), cert. denied, 117 S. Ct. 135 (1996).⁴⁴ The Second

S. Ct. 641 (1997); *United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) ("We will assume, without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit."); *United States v. Young*, 1997 WL 786213, *3 (11th Cir. Dec. 23, 1997) (sustaining conviction for carrying a firearm when the weapon was within reach of the defendant).

⁴⁴ The Second Circuit has applied its "within reach" test in three cases involving automobiles. In *Cruz-Rojas*, the court held that there was insufficient evidence to support a carrying conviction where a gun was discovered under the dashboard of the vehicle in which two defendants convicted of drug trafficking offenses had been arrested. 101 F.3d at 286. In *United States v. Pimentel*, the court found ample evidence to support a conviction for "carrying" a firearm, where the gun in question

Circuit's definition of carrying does not require any showing of movement.

The Second Circuit's expansion of the ordinary and natural meaning of "carries a firearm" leads to absurd results.⁴⁵ Many items can be "within reach" without being carried. For example, the clock on my desk may be within my reach as I sit at the desk, but one would never, in ordinary parlance, say that I am carrying it.⁴⁶ The "within reach" test incorrectly sweeps within the meaning of "carries a firearm" a firearm placed, like my clock, on a desk. However, if the Court adopts the "within reach" construction of carrying a firearm for purposes of § 924(c), petitioners' conduct still falls outside the scope of the statute. The weapons in the locked trunk of Cleveland and Gray-Santana's car were not "within reach" and, therefore, cannot support liability under § 924(c).

The Ninth Circuit agrees that carrying a firearm under § 924(c) requires proof that the firearm is "within

was found in a compartment located on the back of the front passenger seat, and one of three confederates was seated in the back seat. 83 F.3d 55, 58-59 (2d Cir. 1996). In *Giraldo*, the court found that the evidence was "plainly insufficient" to convict a back seat occupant where "there was no evidence that he could have reached the gun in the cavity beneath the change dish from where he sat." 80 F.3d at 676. In contrast, there was sufficient evidence of "carrying" for a second defendant, where the "gun was within easy reach[.]" *Id.* at 677.

⁴⁵ Under this test, the issue invariably arises: how long is my reach? Is Michael Jordan or Kareem-Abdul Jabbar more at risk than Wee Willie Keeler or Tom Thumb?

⁴⁶ The discussion in *Bailey* supports the argument that the clock on my desk is not carried. As the Court explained, "a firearm can be used without being carried, e.g., when an offender has a gun on display during a transaction." 116 S. Ct. at 507.

reach."⁴⁷ After noting that "carrying a weapon" has a specific dictionary meaning, the Ninth Circuit further observed the necessity under the rules of statutory construction to give "carry" a meaning separate and distinct from "transport." *United States v. Foster*, 1998 WL 2521, at *3 (9th Cir. Jan 5, 1998) (en banc) (noting that this is a "similar danger" to that addressed in *Bailey*, in which a broad reading of "use" would reduce it to a synonym for the term "possess"). A broad reading of "carry," the Ninth Circuit pointed out, would "come[] dangerously close to [encompassing mere possession] by prohibiting possession of a gun in a moving vehicle." *Id.* Arguing that such a reading would not reach all possession does not suffice, the Ninth Circuit continued, because "it is not clear why possession in a moving vehicle is any different from possession anywhere else." *Id.* In sum, the Ninth Circuit grounds its "within easy reach" interpretation of "carries a firearm" on its understanding of that phrase,

⁴⁷ In *United States v. Foster*, Judge Kozinski reiterated the Ninth Circuit's test: "in order for a defendant to be convicted of 'carrying' a gun in violation of section 924(c)(1), the defendant must have transported the firearm on or about his or her person. . . . This means the firearm must have been immediately available for use by the defendant." 1998 WL 2521, at *5 (9th Cir. Jan 5, 1998) (en banc) (quoting *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996)). The Ninth Circuit uses several phrases, seemingly interchangeably, to identify the scope of "carrying"; these phrases include "within easy reach," *id.* at *3, "immediately accessible," *id.* and "on or about the person," *id.* See also *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (concluding that a firearm was carried "'about' [the defendant's] person, within reach and immediately available for use"), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Willett*, 90 F.3d 404, 407 (9th Cir. 1996) (holding that defendant carried a firearm "within reach and immediately available for use").

and a need to distinguish "carry" from "possess" and "transport." Again, the problem arises as to where to draw the line between "easy reach," "not so easy reach," "it's a stretch," and "beyond reach."

In addition to requiring that a firearm be "within reach," the Ninth Circuit integrates a motion element to carrying. As the majority in *Foster* explained:

The key aspect of the narrow definition is not that the weapon actually be borne on the person. Rather, it is that the weapon remain within easy reach while the individual is in motion. Where an individual is walking, a gun in hand certainly amounts to carrying, but so does a gun in a holster or a shopping bag. The essence is that the weapon moves with the person and can be swiftly put to use.

Foster, at *2 (footnote omitted). In explaining why "carrying a firearm" covers broader terrain in an automobile context, the Ninth Circuit again focuses on movement, writing:

Because the car and its contents move in unison, any weapon that is within hand's reach while the car is in motion can be said to be carried. The same would be true, of course, if the individual had the weapon concealed in a train compartment, a bus or, . . . an airplane.

Id. (footnote omitted). Although petitioners contend that motion is not a necessary component of "carrying a firearm" and that "within reach" is an overly inclusive and difficult to apply construction of the phrase, they still

prevail under the Ninth Circuit's test, just as they prevail under the Second Circuit's test.⁴⁸

The Sixth Circuit requires that a firearm be "within reach" or "immediately accessible" to support liability for carrying under § 924(c). *See, e.g., United States v. Washington*, 127 F.3d 510, 514 (6th Cir. 1997).⁴⁹ In addition, the Sixth Circuit requires proof of transportation. *Id.* The Sixth Circuit explained its reasons for adopting the "transport and accessibility" test in *United States v. Moore*:

⁴⁸ The Ninth Circuit applied its test to the facts as follows:

While driving Foster could not reach the gun. To use the gun he would have had to stop the truck, get out, go to the back of the truck, open a snap-down tarp, and unzip the bag containing the gun. . . . If that counts as immediately available, then one could never take a trip with a gun in a vehicle without it being immediately available.

Foster, at *5 (footnote omitted). The firearms in the case at bar were similarly inaccessible.

⁴⁹ *See also United States v. Mauldin*, 109 F.3d 1159, 1161 (6th Cir. 1997) (finding liability for carrying where a gun was "within easy reach and immediately available for use"); *United States v. Taylor*, 102 F.3d 767, 769 (6th Cir. 1996), *cert. denied*, 118 S. Ct. 327 (1997); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1995) (requiring a showing of "immediate accessibility" of a firearm to sustain a conviction for carrying a weapon in an automobile), *cert. denied*, 117 S. Ct. 136 (1996). It should be noted that the Sixth Circuit currently has *United States v. Malcuit*, 104 F.3d 880 (6th Cir.), *vacated* 116 F.3d 163 (1997), under en banc review. In *Malcuit*, the court faces two questions: (1) whether a person involved in a drug transaction that was taking place outside his car, carried a firearm that was located inside that car, and (2) whether there was sufficient evidence that the firearm which was present "during" the predicate offense, was also present "in relation to" that offense.

Although the immediate availability of [a] gun [is] a key factor [in determining whether or not a firearm is carried], we [have not held that] availability [is] the *only* relevant consideration; if Congress had meant section 924(c)(1) to implicate any individual who happens to be within arm's reach of a firearm, surely it would have selected a more accurate term than "carry." A definition of "carry" that takes only availability into account ignores the term's most obvious connotation, *i.e.*, physical transportation.

76 F.3d 111, 113 (6th Cir. 1996) (emphasis in original).⁵⁰ This formulation grafts the "within reach" test onto the "transportation" element that other circuits have equated with "carrying."

Although this analysis suffers from the same flaws as does the Ninth Circuit's analysis, petitioners' convictions could not be sustained under the Sixth Circuit test, because the weapons at issue were not immediately accessible. Consequently, petitioners' convictions should be vacated even if the Court determines that "within reach" or "immediate accessibility" is the appropriate test for "carrying." Nothing in the locked trunk was within the immediate reach of either Gray-Santana or Cleveland at any point during the aborted drug transaction. The trunk lid, bag and clothing were interposed between the petitioners and the guns at all times.

⁵⁰ Petitioner's formulation of "carries on the person" avoids the problem identified by the Sixth Circuit, that "within reach" is not an adequate limitation on "carrying." Petitioners' formulation also reaches those cases in which no movement is involved, but only where a weapon is "on the person" and immediately available for use. The Sixth and Ninth Circuit formulations, which require movement or transportation, arguably would not reach these circumstances.

CONCLUSION

For the foregoing reasons, the Court should adopt the ordinary and natural meaning of the phrase "carries a firearm" in construing § 324(c), reverse the First Circuit and vacate petitioners' convictions.

Respectfully submitted,

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UNITED STATES CODE TITLE 18. CHAPTER 44 - FIREARMS

§ 922. Unlawful acts

(a) It shall be unlawful -

(1) for any person -

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that -

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to

deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to -

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of testing or experimentation authorized by the Secretary;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to -

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Secretary; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver -

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such

States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if -

- (1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are. . . .

Signature. . . . Date. . . . "

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

- (2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement. A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person -

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such

intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that -

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence. This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in

which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person -

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that -

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or

transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment -

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

(2) This subsection does not apply with respect to -

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm -

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection -

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Secretary, that is -

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors: Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Secretary shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Secretary shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Secretary shall ensure that rules and regulations

adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Secretary shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which -

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Secretary and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that -

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as

documented in numerous hearings in both the Committee on the Judiciary the House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves - even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm -

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is -

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school

premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm -

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable

to sporting purposes except that this subsection shall not apply to -

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Secretary.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless -

(A) after the most recent proposal of such transfer by the transferee -

(i) the transferor has -

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that -

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because -

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are

extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only -

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee -

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who is illegally or unlawfully in the United States;

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to -

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law -

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages -

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless -

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall -

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if -

(A)(i) such other person has presented to the licensee a permit that -

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because -

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than \$5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages -

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

(v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

(3) Paragraph (1) shall not apply to -

(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

(B) any firearm that -

(i) is manually operated by bolt, pump, lever, or slide action;

(ii) has been rendered permanently inoperable; or

(iii) is an antique firearm;

(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine. The fact that a firearm is not listed in Appendix A shall not be construed to mean that paragraph (1) applies to such firearm. No firearm exempted by this subsection may be deleted from Appendix A so long as this subsection is in effect.

(4) Paragraph (1) shall not apply to -

(A) the manufacture for, transfer to, or possession by the United States or a department

or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(w)(1) Except as provided in paragraph (2), it shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device.

(2) Paragraph (1) shall not apply to the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of this subsection.

(3) This subsection shall not apply to -

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving ammunition, of a large capacity ammunition feeding device transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of any large capacity ammunition feeding device by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(4) If a person charged with violating paragraph (1) asserts that paragraph (1) does not apply to such person because of paragraph (2) or (3), the Government shall have the burden of proof to show that such paragraph (1) applies to such person. The lack of a serial number as described in section 923(i) of this title shall be a presumption that the large

capacity ammunition feeding device is not subject to the prohibition of possession in paragraph (1).

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile -

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess -

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to -

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile -

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not

prohibited by Federal, State, or local law from possessing a firearm, except -

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever -

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly -

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if -

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if

engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) -

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of

the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and -

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are -

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or

the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection -

(A) the term "serious drug offense" means -

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the

Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that -

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which -

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)), travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall -

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that -

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)), smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

§ 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, before the repeal of such section by section 1624(a) of the Corporation for the Promotion of Rifle Practice and Firearms Safety Act, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such members, and such members or clubs may receive a firearm or ammunition determined by the Secretary of the Treasury to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Secretary to be consistent with the provisions of this chapter and other applicable Federal and State laws and published ordinances, the Secretary may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A)

determined by the Secretary to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraph (3) of this subsection, the term "United States" means each of the several States and the District of Columbia.

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court

may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Secretary shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition -

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of

such firearm which would be prohibited if assembled; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition. The Secretary shall permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

(e) Notwithstanding any other provision of this title, the Secretary shall authorize the importation of, by any licensed importer, the following:

(1) All rifles and shotguns listed as curios or relics by the Secretary pursuant to section 921(a)(13), and

(2) All handguns, listed as curios or relics by the Secretary pursuant to section 921(a)(13), provided that such handguns are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

§ 926A. Interstate transportation of firearms

Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully

possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

§ 929. Use of restricted ammunition

(a)(1) Whoever, during and in relation to the commission of a crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm and is in possession of armor piercing ammunition capable of being fired in that firearm, shall, in addition to the punishment provided for the commission of such crime of violence or drug trafficking crime be sentenced to a term of imprisonment for not less than five years.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(b) Notwithstanding any other provision of law, the court shall not suspend the sentence of any person convicted of a violation of this section, nor place the person on probation, nor shall the terms of imprisonment run concurrently with any other terms of imprisonment, including that imposed for the crime in which the armor piercing ammunition was used or possessed. No person sentenced under this section shall be eligible for parole during the term of imprisonment imposed herein.

§ 930. Possession of firearms and dangerous weapons in Federal facilities

(a) Except as provided in subsection (d), whoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a Federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both.

(b) Whoever, with intent that a firearm or other dangerous weapon be used in the commission of a crime, knowingly possesses or causes to be present such firearm or dangerous weapon in a Federal facility, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

(c) A person who kills or attempts to kill any person in the course of a violation of subsection (a) or (b), or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon, shall be punished as provided in sections 1111, 1112, and 1113.

(d) Subsection (a) shall not apply to -

(1) the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law;

(2) the possession of a firearm or other dangerous weapon by a Federal official or a member of the Armed Forces if such possession is authorized by law; or

(3) the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes.

(e)(1) Except as provided in paragraph (2), whoever knowingly possesses or causes to be present a firearm in a Federal court facility, or attempts to do so, shall be fined under this title, imprisoned not more than 2 years, or both.

(2) Paragraph (1) shall not apply to conduct which is described in paragraph (1) or (2) of subsection (d).

(f) Nothing in this section limits the power of a court of the United States to punish for contempt or to promulgate rules or orders regulating, restricting, or prohibiting the possession of weapons within any building housing such court or any of its proceedings, or upon any grounds appurtenant to such building.

(g) As used in this section:

(1) The term "Federal facility" means a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.

(2) The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

(3) The term "Federal court facility" means the courtroom, judges' chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

(h) Notice of the provisions of subsections (a) and (b) shall be posted conspicuously at each public entrance to each Federal facility, and notice of subsection (e) shall be posted conspicuously at each public entrance to each Federal court facility, and no person shall be convicted of an offense under subsection (a) or (e) with respect to a Federal facility if such notice is not so posted at such facility, unless such person had actual notice of subsection (a) or (e), as the case may be.
